STATE OF MICHIGAN

IN THE SUPREME COURT

JAMES WADE

Plaintiff-Appellee,

v

WILLIAM McCADIE, D.O. and ST. JOSEPH HEALTH SYSTEM d/b/a HALE ST. JOSEPH MEDICAL CLINIC

Defendants-Appellants.

Supreme Court
Docket No.: 151196

Court of Appeals
Docket No.: 317531

Iosco County Circuit Court
Case No.: 13-007515-NI

SUPPLEMENTAL BRIEF BY DEFENDANTS-APPELLANTS WILLIAM MCCADIE, M.D. AND ST. JOSEPH HEALTH SYSTEM D/B/A HALE ST. JOSEPH MEDICAL CLINIC

CERTIFICATE OF SERVICE

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STATEMENT OF QUESTIONS PRESENTED

I WHETHER THE 91-DAY EXTENSION PROVIDED IN MCL 600.2912d(3) FOR FILING AN AFFIDAVIT OF MERIT APPLIES WHERE THE PLAINTIFF CLAIMS THAT THE DEFENDANTS DID NOT PRODUCE ALL MEDICAL RECORDS WITHIN 56 DAYS AFTER RECEIPT OF THE NOTICE OF INTENT AS REQUIRED BY MCL 600.2912b(5)?

II WHETHER THE DEFENDANTS WERE OBLIGATED, UNDER MCL 600.2912b(5), TO EXPLAIN TO THE PLAINTIFF THAT CERTAIN RECORDS COULD NOT BE PRODUCED BECAUSE THEY HAD BEEN DESTROYED?

III WHETHER BILLING RECORDS ARE MEDICAL RECORDS FOR PURPOSES OF MCL 600.2912b(5)?

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ARGUMENT

I WHETHER THE 91-DAY EXTENSION PROVIDED IN MCL 600.2912d(3) FOR FILING AN AFFIDAVIT OF MERIT APPLIES WHERE THE PLAINTIFF CLAIMS THAT THE DEFENDANTS DID NOT PRODUCE ALL MEDICAL RECORDS WITHIN 56 DAYS AFTER RECEIPT OF THE NOTICE OF INTENT AS REQUIRED BY MCL 600.2912b(5).

Defendants Dr. William McCadie and Hale St. Joseph Medical Clinic submit that the 91-day extension for filing an affidavit of merit provided in MCL 600.2912d(3) does not apply where the plaintiff claims that defendants did not "produce" all medical records within 56 days after receipt of the notice of intent as required by MCL 600.2912b(5). Although the Court of Appeals held below that MCL 600.2912b(5) establishes a "clear statutory obligation" to "provide plaintiff with his complete medical records," *Wade v McCadie*, unpublished opinion per curiam of the Court of Appeals, issued January 29, 2015 (Docket No. 317531), *slip op* at 1, this is not, in fact, what the statute requires. Rather, MCL 600.2912b(5) merely requires that a health professional or health facility allow a claimant "access" to all medical records "related" to the claims that are in the "control" of the health professional or facility. For the reasons set forth below, defendants complied with their statutory obligation under §2912b(5) and therefore plaintiff's claims are barred by the statute of limitations due to plaintiff's failure to file a complaint with an affidavit of merit before expiration of the limitations period.

A. Underlying Facts Relevant To Defendants Allowing Plaintiff "Access" To All Medical Records "Related" To Plaintiff's Claim Within Defendants' "Control."

This matter arises out of plaintiff's claim that defendants breached the standard of care in treating plaintiff between June 2008 and February 2012, by failing to properly manage his hypertension.

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Prior to mailing the notice of intent, plaintiff's counsel sent a request for Mr. Wade's medical records to Hale Medical Clinic on April 2, 2012 (4/2/12 records request, Exhibit 2 to plaintiff's brief on appeal in the Court of Appeals). Plaintiff's request for records was made pursuant to the Medical Records Access Act, MCL 333.26261, et seq, and included a "designation of authorized representative" authorizing attorney Thomas C. Miller to act as Mr. Wade's authorized representative for purposes of obtaining the medical records (*Id.*).

There is no dispute that defendants Dr. William McCadie and Hale St. Joseph Medical Clinic provided 134 pages of Mr. Wade's medical records to plaintiff's counsel on April 26, 2012, in response to plaintiff's April 2, 2012 request for records (plaintiff's brief on appeal in the Court of Appeals, p 1; bill for copying records, Exhibit 3 to plaintiff's brief on appeal in the Court of Appeals). The medical records provided to plaintiff's counsel included clinic notes from November 19, 1979 to February 7, 2012 and laboratory results from March 13, 1992 to April 21, 2011 (notice of intent, Exhibit 5 to plaintiff's brief on appeal in the Court of Appeals).

On August 21, 2012, four months after plaintiff's counsel received the medical records, plaintiff sent a presuit notice of intent to defendants Dr. McCadie and Hale St. Joseph Medical Clinic (notice of intent). In the notice of intent, plaintiff requested access to all of plaintiff's medical records within defendants' control, including billing and payment records, within 56 days under MCL 600.2912b(5) (*Id.*). Plaintiff further stated in the notice of intent that "Some medical records have already been provided; however,

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the clinic notes beginning with November 19, 1979, but the laboratory results begin with 1979[1]. As a result the undersigned would request the entire chart be provided" (*Id.*).

Thus, the only documents plaintiff had not already received and had access to after sending the notice of intent were billing records and laboratory results between 1979 and 1992.

Despite plaintiff's request for additional records, plaintiff's counsel included in the notice of intent an extensive summary of the medical records received to date (notice of intent, pp 2-4). As recognized by the Court of Appeals below, the notice of intent not only summarized the medical records plaintiff's counsel had received from defendants in April 2012, but also identified the purported shortcomings of Dr. McCadie's care as revealed by those medical records:

> Plaintiff's counsel also specifically referenced and described the following medical records: blood pressure readings from 1991 through 2011; a fluctuation in "BUN, creatinine, and BUN/creatinine ratio" between 1992 and 2000; creatinine levels from 2008 and 2009; prescriptions for medication from 1992 and 1993; and McCadie's notes through 2012. Also, plaintiff's counsel, using the medical records provided to date, the letter outlines McCadie's failure to control plaintiff's blood pressure, hypertension, and creatinine levels. The letter asserts that plaintiff's acute and prolonged hypertension began in 2008, and that McCadie failed at that time to refer plaintiff to a specialist. Further, the letter asserts that McCadie ignored "ominous" laboratory results in 2011, which made it clear that plaintiff was suffering from significant renal dysfunction. [*Wade v McCadie*, unpublished opinion per curiam of the Court of Appeals, issued January 29, 2015 (Docket No. 317531), *slip op* at 2].

On September 17, 2012, defense counsel sent correspondence to plaintiff's counsel, requesting that plaintiff provide defendants with a complete copy of all medical

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[1] Later correspondence sent by plaintiff's counsel on September 25, 2012 clarified that the laboratory results began in 1992, not 1979 as stated in the notice of intent (9/25/12 correspondence, Exhibit 7 to plaintiff's brief on appeal in the Court of Appeals).

records in plaintiff's control and enclosing authorizations to be signed by plaintiff to allow defendants to obtain plaintiff's medical records (9/17/12 correspondence, Exhibit 6 to plaintiff's brief on appeal in the Court of Appeals). Plaintiff's counsel sent correspondence to defense counsel in response to the September 17 letter on September 25, 2012, enclosing signed authorizations, again requesting the entire chart "because the clinical notes began with 1979 and the laboratory results began with ***1979***, which should have read 1992 instead of 1979," and proposing that the attorneys meet to exchange medical records (9/25/12 correspondence [emphasis in original], Exhibit 7 to plaintiff's brief on appeal in the Court of Appeals). Plaintiff's counsel sent correspondence to defense counsel on January 2, 2013, again offering to meet to exchange medical records (1/2/13 correspondence, Exhibit 8 to plaintiff's brief on appeal in the Court of Appeals).

There is no dispute that the attorneys did not meet during the notice period.

Plaintiff filed a complaint on February 22, 2013 (complaint). Plaintiff alleges in the complaint that Mr. Wade was admitted to Bay Regional Medical Center on February 22, 2012, at which time Mr. Wade was diagnosed with renal failure due to poorly controlled hypertension (*Id.*, ¶ 9). Plaintiff alleges that Dr. McCadie was negligent in failing to properly manage and treat plaintiff's hypertension from June 2008 to February 2012, as follows:

> A review of the records provided to date indicates that Dr. McCadie breached the applicable standards of care when he failed to properly manage and treat Mr. Wade's acute and prolonged uncontrolled hypertensive state; and he failed to refer Mr. Wade to appropriate specialists for consultation and/or treatment. Specifically, Dr. McCadie ignored the elevated creatinine levels in June 2008 after years of recurrent episodes of uncontrolled hypertension that had been somewhat effectively treated after the BUN and creatinine had returned to the normal range in

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> the recent past. The elevated creatinine level obtained in June 2008 became more significant in light of the clinical presentation documented by Dr. McCadie in December 2008 and July 2012, choosing instead to simply renew Mr. Wade's medication prescriptions by phone. In addition he completely ignored the ominous laboratory test results in April 2011, when it was clear that Mr. Wade was suffering from significant renal dysfunction. In fact, Dr. McCadie did not see Mr. Wade for almost ten months after receiving the April 2011 laboratory test results. [Complaint, ¶ 12].

Plaintiff alleges that Dr. McCadie's breaches of the standard of care led to plaintiff's renal and kidney failure (*Id.*, ¶ 13).

Plaintiff's complaint was not accompanied by an affidavit of merit as required by MCL 600.2912d(1).

On March 1, 2013, plaintiff mailed to defendants a request for production of documents, requesting in relevant part all medical records in defendants' control and billing and payment summaries maintained by defendants (request for production of documents, Exhibit 9 to plaintiff's brief on appeal in the Court of Appeals).

The attorneys met to exchange medical records on April 24, 2013, at which time plaintiff's counsel requested that defendants determine whether plaintiff's laboratory records for the time period prior to 1992 were available (5/15/13 correspondence, Exhibit 10 to plaintiff's brief on appeal in the Court of Appeals). By correspondence dated May 15, 2013, counsel for defendants notified plaintiff's counsel that "[u]pon information and belief, laboratory records pertaining to Mr. Wade for the time period prior to 1992 no longer exist. Those records were destroyed in a manner consistent with the requirements of Michigan Public Health Code section 333.16213(4)," which provides that a licensed health care provider may destroy or otherwise dispose of medical records after 7 years (*Id.*).

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Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(7) on May 7, 2013, due to plaintiff's failure to file an affidavit of merit at any time before expiration of the statute of limitations applicable to plaintiff's claims (motion for summary disposition).

Plaintiff filed a response to the motion for summary disposition, arguing that plaintiff was afforded an additional 91 days from the filing of the complaint to file an affidavit of merit because defendants failed to allow access to plaintiff's medical records during the notice of intent period, relying upon MCL 600.2912d(3) (plaintiff's response to motion for summary disposition). Plaintiff conceded in the response that plaintiff's cause of action accrued on April 21, 2011 or April 25, 2011 (when the test results were obtained), and thus the complaint filed on February 22, 2013 was filed within 2 years of the alleged malpractice and his affidavit of merit filed on May 24, 2013 was filed 91 days after the complaint (*Id.*, p 2 in motion, pp 4-5 in brief in support).

In addition to filing the response to the motion for summary disposition, plaintiff also filed an affidavit of merit by internal medicine specialist Dr. Richard Stern (affidavit of merit). In the affidavit, Dr. Stern attested that, after reviewing plaintiff's medical records "covering a period from November 19, 1979, until February 7, 2012," there was "no significant laboratory or clinical evidence of any significant renal dysfunction, despite periods of uncontrolled hypertension and frequent use of the drug Indocin for gout symptoms, until laboratory test results were obtained on or about April 21, 2011" (*Id.*, p 2, ¶ 8). On April 21, 2011, Dr. Stern contended, "Mr. Wade's medical situation changed when the laboratory results indicated that he had evidence of renal dysfunction,

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specifically his BUN was found to be elevated at 33, and his creatinine level was found to be elevated at 2.4" (*Id.*).

Dr. Stern attested in the affidavit of merit that Dr. McCadie breached the standard of care in various ways when he "failed to appreciate the significance of the April 21, 2011 laboratory test results that revealed evidence of renal dysfunction," as follows:

> Based upon the medical records that I have been provided, Dr. McCadie breached the applicable standards of care when he failed to appreciate the significance of the April 21, 2011 laboratory test results that revealed evidence of renal dysfunction. Mr. Wade was not reappointed on a regular basis for regular laboratory assessments of renal function and blood pressure checks. He was not told of the results of the April 21, 2011 laboratory results that demonstrated renal dysfunction. He was not sent for diagnostic testing to determine the exact cause for the renal dysfunction. He was not told of the consequences of failing to keep his blood pressure under tight control and its possible role in the renal dysfunction; and he was not told of the need to change his behavior, diet and medication to aggressively address his long-standing hypertension. He was not taken off Indocin and provided with alternative medication that did not carry a nephrotoxic risk. Finally, he was not referred to a nephrologist for consultation and follow-up care. In fact, Mr. Wade was not seen in the clinic for ten months following the abnormal April 21, 2011 laboratory test results; and, remarkably, he was not subjected to additional testing at that time to ascertain his ongoing renal functioning. [Affidavit of merit, p 3, ¶ 10].

In other words, the affidavit of merit filed on May 28, 2013 and signed by Dr. Stern supported the allegations set forth in plaintiff's complaint filed on February 22, 2013.

B. The Court Of Appeals Erred In Holding That MCL 600.2912b(5) Required Defendants To "Provide" Plaintiff With His "Complete" Medical Records, Rather Than Allow "Access" To All Medical Records "Related" To The Claim In The Defendants' "Control."

MCL 600.2912b requires a plaintiff to send a notice of intent prior to filing an action alleging medical malpractice. MCL 600.2912b(5) specifically requires a

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defendant receiving a presuit notice of intent to allow "access" to all medical records "related" to plaintiff's claim within the defendant's "control," as follows:

> Within 56 days after giving notice under this section, the claimant shall allow the health professional or health facility receiving the notice access to all of the medical records related to the claim that are in the claimant's control, and shall furnish releases for any medical records related to the claim that are not in the claimant's control, but of which the claimant has knowledge. Subject to section 6013(9), within 56 days after receipt of notice under this section, the health professional or health facility shall allow the claimant access to all medical records related to the claim that are in the control of the health professional or health facility. This subsection does not restrict a health professional or health facility receiving notice under this section from communicating with other health professionals or health facilities and acquiring medical records as permitted in section 2912f. This subsection does not restrict a patient's right of access to his or her medical records under any other provision of law. [MCL 600.2912b(5) (emphasis added)].

MCL 600.2912d requires a plaintiff in an action alleging medical malpractice to file with the complaint an affidavit of merit, signed by a health professional, attesting to the merits of plaintiff's claim. MCL 600.2912d(3) specifically provides that an affidavit of merit may be filed within 91 days after the filing of the complaint if the defendant fails to allow access to medical records as required in MCL 600.2912b(5), as follows:

> If the defendant in an action alleging medical malpractice fails to allow access to medical records within the time period set forth in section 2912b(6)[2], the affidavit required under subsection (1) may be filed within 91 days after the filing of the complaint. [MCL 600.2912d(3)].

There is no dispute that, if defendants allowed plaintiff "access" to all medical records "related" to plaintiff's claim within defendants' "control" under MCL 600.2912b(5), plaintiff's claim is barred by the statute of limitations. The only way that plaintiff's claim is timely is if defendants failed to comply with their statutory duty under

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[2] There is no dispute that MCL 600.2912d(3) mistakenly refers to MCL 600.2912b(6), rather than MCL 600.2912b(5).

§2912b(5), thus affording plaintiff an additional 91 days in which file the affidavit of merit under §2912d(3). Defendants submit that they complied with their statutory obligation under §2912b(5), and therefore plaintiff was not entitled to an additional 91 days in which to file the affidavit of merit under §2912d(3).

As set forth above, the Court of Appeals held below that MCL 600.2912b(5) establishes a "clear statutory obligation" to "provide plaintiff with his complete medical records." *Wade v McCadie*, unpublished opinion per curiam of the Court of Appeals, issued January 29, 2015 (Docket No. 317531), *slip op* at 1. This is not, however, what the statute requires. Rather, MCL 600.2912b(5) merely requires that a health professional or health facility allow a claimant "access" to all medical records "related" to the claims that are in the "control" of the health professional or facility.

It is well established that a statute must be applied according to its own plain language. *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001). When the language of a statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. *Krusac v Covenant Med Ctr, Inc*, 497 Mich 251, 256; 865 NW2d 908 (2015). No further judicial construction is required or permitted. *Id.* A court may consult dictionary definitions to give words their common and ordinary meaning. *Id.* at 259.

Although not directly at issue here, the Court of Appeals was incorrect in stating that §2912b(5) requires "production" of all medical records by the health professional or health facility. The Legislature in MCL 600.2912b(5) merely requires a health professional or health facility to allow a claimant "access" to medical records related to the claim that are within the control of the health professional or facility within 56 days of

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receipt of the notice of intent. The Court of Appeals effectively ignored the plain language of the statute in holding that the statute required defendants to "provide" all records, and the Court's terminology should be corrected.

Second, the Court of Appeals erred in holding that §2912b(5) requires a health professional or health facility to provide plaintiff with his "complete" medical records. *Wade v McCadie*, *slip op* at 1. Rather, the plain language of §2912b(5) requires the recipient of a presuit notice of intent to allow the claimant access to "all medical records related to the claim." Had the Legislature intended to require a health professional or health facility to provide a claimant with a "complete" set of records or "all medical records in its possession," it would have included such language in the statute. The statute, however, must be applied according to its own plain language, *Wickens*, *supra*, which only requires access to all medical records "related" to the claim.

Nor does the plain language of §2912b(5) support the Court of Appeals' ruling that the trial court's ruling below improperly allows health professionals and facilities to "pick and choose what information to supply to a plaintiff, even in the face of clear statutory language that access to all medical records be provided." *Wade v McCadie*, *slip op* at 5. Again, the plain language of §2912b(5) only requires a health professional or health facility to allow access to all medical records "related" to the claim. "Related" is defined as "connected by reason of an established or discoverable relation." *W* (1991). Given the plain language of the statute, the Legislature clearly afford the health professional or health facility the right to "pick and choose" under §2912b(5) to determine what records are "related" to plaintiff's claim and thus must be disclosed.

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To hold otherwise is to ignore the plain language of §2912b(5) and render nugatory the language in §2912b(5) obliging defendants only to allow access to medical records "related" to the claim. It is well established that, in ascertaining legislative intent, every word, phrase, and clause in the statute must be given effect, *Shinholster v Annapolis Hospital*, 471 Mich 540, 548-549; 685 NW2d 275 (2004), and courts must avoid a construction that would render any part of a statute surplusage or nugatory, *Omelenchuk v City of Warren*, 466 Mich 524, 528; 647 NW2d 493 (2002). Defendants submit that a plain reading of §2912b(5) compels the conclusion that a health professional or health facility must only allow a plaintiff access to all medical records "related" to the claim, rather than a plaintiff's "complete" medical records.

C. Defendants Met Their Statutory Obligation To Allow Plaintiff Access To All Medical Records Related To The Claim In Defendants' Control.

Here, defendants met their statutory obligation to allow plaintiff "access" to all medical records "related" to the claim that were in defendants' "control."

First, defendants met the statutory burden under §2912b(5) to allow "access" to the medical records by furnishing the medical records to the plaintiff prior to receipt of the notice of intent. As set forth above, defendants provided plaintiff's counsel with Mr. Wade's entire chart, comprised of 134 pages of medical records, on April 26, 2012, four months before plaintiff sent the presuit notice of intent. Thus, plaintiff had access to the medical records (as they were already in plaintiff's possession) during the 56-day period following the mailing of the notice of intent.

Providing a copy of the records prior to the plaintiff sending the presuit notice of intent satisfies the underlying purpose of the statute, which is to deter a medical malpractice defendant from failing to provide, and to ensure a medical malpractice

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plaintiff's receipt of, medical records in a prompt and fair manner. Plaintiff's receipt of a copy of defendants' records in April 2012, before he mailed the presuit notice of intent in August 2012, ensured that plaintiff had "access" to the information that would be needed by an expert witness in order to evaluate the merits of plaintiff's claim in a timely manner, during the 56-day period.

And, as demonstrated above, plaintiff's receipt of the records in April 2012 did in fact allow plaintiff to evaluate the claim and identify the purported breaches of the standard of care by Dr. McCadie. Plaintiff's counsel included in the notice of intent specific details taken from the medical records regarding Dr. McCadie's alleged failure to control plaintiff's blood pressure, hypertension, and creatinine levels (notice of intent). Additionally, as acknowledged by the Court of Appeals, plaintiff asserted in the notice of intent that Mr. Wade's "acute and prolonged hypertension began in 2008, and that McCadie failed at that time to refer plaintiff to a specialist" and that "McCadie ignored 'ominous' laboratory results in 2011, which made it clear that plaintiff was suffering from significant renal dysfunction." *Wade v McCadie*, unpublished opinion per curiam of the Court of Appeals, issued January 29, 2015 (Docket No. 317531), *slip op* at 2. Plaintiff's receipt of the medical records prior to mailing the notice of intent thus allowed plaintiff to identify various acts or omissions by Dr. McCadie that purportedly fell below the standard of care, which, notably, are the same allegations included in plaintiff's complaint and affidavit of merit.

Defendants also complied with the statutory directive to allow access to all medical records "related" to the claim. As set forth in the presuit notice of intent, complaint, and plaintiff's expert's affidavit of merit, plaintiff asserts that Dr. McCadie was

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negligent in failing to properly manage and treat plaintiff's hypertension from June 2008 to February 2012, which plaintiff claims resulted in plaintiff's renal and kidney failure (notice of intent; complaint, ¶¶ 12-13; affidavit of merit, p 3, ¶ 10). There is no dispute that defendants provided plaintiff with all records related to those claims, including clinic notes from November 19, 1979 to February 7, 2012 and laboratory results from March 13, 1992 to April 21, 2011, when plaintiff requested Mr. Wade's medical records in April 2012.

Additionally, because plaintiff's claim involves the care and treatment provided by Dr. McCadie from 2008 to 2012, the destroyed medical records (laboratory reports from 1979 to 1992) and corresponding billing records have nothing to do with the claim at issue. Even if these records were available, defendants could have reasonably concluded that these records were not "related" to the claim. As such, there was no "gamesmanship" by the defendants with respect to the records provided to the plaintiff, as found by the Court of Appeals below. *Wade v McCadie*, *slip op* at 5.

Finally, defendants complied with the statutory directive under §2912b(5) to allow access to all medical records related to the claim that are in the "control" of the health professional. Defendants provided evidence that the 134 pages of medical records provided to plaintiff's counsel on April 26, 2012 were the only records in defendants' "control" at the time disclosure was sought (5/15/13 correspondence to plaintiff's counsel, Exhibit 10 to plaintiff's brief on appeal in the Court of Appeals). While other records, including laboratory records from 1979 to 1992, were destroyed prior to plaintiff's request for Mr. Wade's records, there is no claim that defendants improperly destroyed these records in contravention of MCL 333.16213(1) and (4).

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Because defendants complied with the requirements of §2912b(5) and allowed plaintiff "access" to all medical records "related" to plaintiff's claim that were in defendants' "control" within 56 days of defendants' receipt of the presuit notice of intent, plaintiff was not afforded an additional 91 days in which to file the affidavit of merit under §2912d(3), thus rendering plaintiff's claims untimely.

D. A Plaintiff Who Unilaterally Asserts That A Health Professional Or Health Facility Failed To Allow Access To All Medical Records Related To The Claim In The Control Of The Health Professional Or Health Facility As Required By §2912b(5), Does So At His Or Her Own Peril.

Moreover, a plaintiff who unilaterally asserts that a health professional or health facility did not allow access to all medical records related to the claim in the control of the health professional or health facility, does so at his or her own peril. Because §2912b(5) does not require production of all records, but rather requires access to all medical records related to the claim in the defendants' control, there is certainly some measure of discretion given to the health professional or health facility to determine what records must be disclosed under §2912b(5). If a plaintiff unilaterally makes a determination on the sufficiency of the disclosure, and relies upon the purported failure to comply with §2912b(5) as a basis for affording an additional 91 days to file the affidavit of merit under §2912d(3), plaintiff runs the risk that a trial court ultimately will hold that the defendant did provide access to all records related to the claim, thus rendering the complaint and affidavit of merit untimely.

In an analogous context, this Court in *Bush v Shabahang*, 484 Mich 156, 184-185; 772 NW2d 272 (2009) held that a plaintiff who unilaterally makes a determination as to the validity of a response to a notice of intent under MCL 600.2912b(7) "does so at his or her own peril." In *Bush*, the plaintiff mailed a presuit notice of intent to defendants

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on August 5, 2005, asserting negligence during plaintiff's August 7, 2003 surgical procedure. *Bush* at 162. Certain defendants responded to plaintiff's notice of intent as required by MCL 600.2912b(7). *Id.* Plaintiff thereafter filed suit against all defendants on January 27, 2006, which was only 175 days after plaintiff served the presuit notice on defendants. *Id.* Defendants moved for summary disposition on the basis that plaintiff had failed to wait the required 182-day notice period after defendants sent a response to plaintiff's notice of intent. *Id.* Plaintiff argued in response to the motion that the responses to the notice of intent were deficient, such that he could properly file his complaint after 154 days from the date of service, pursuant to MCL 600.2912b(7)(d). *Id.*

This Court held that, while a plaintiff may unilaterally make a determination on the validity of a response to a notice of intent, if a court ultimately determines that the response to the notice of intent is not defective, a plaintiff risks having the complaint deemed untimely, as follows:

> Finally, defendant asserts that plaintiff does not have the right to unilaterally make a determination on the validity of a response. We agree with the Court of Appeals that a plaintiff who unilaterally makes such a decision does so at his or her own peril. If a court ultimately determines that the response is not defective, plaintiff's complaint may be deemed untimely. However, given the limited time period involved, it would be virtually impossible for a Court to adjudicate this issue on a timely basis. By the time the parties could schedule a hearing and brief the issue, the shortened time period afforded by § 2912b would be lost. Therefore, we agree with the Court of Appeals that a plaintiff may choose to make his own determination regarding the sufficiency of a response, but he does so at the risk of having a court later determine that the defendant's response was indeed adequate. We conclude that § 2912b(7) allows a plaintiff to file a complaint early if the defendant's response to the NOI is defective. [*Bush*, *supra* at 184-185].

Similarly, here, while a plaintiff may unilaterally choose to determine that a defendant failed to allow plaintiff "access" to all medical records "related" to the claim that are in the "control" of the health professional or health facility as required under

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§2912b(5), plaintiff does so at the risk of having a court later determine that the defendant did in fact allow "access" to medical records "related" to the claim in the defendants' "control," thus rendering plaintiff's claims untimely.

II WHETHER THE DEFENDANTS WERE OBLIGATED, UNDER MCL 600.2912b(5), TO EXPLAIN TO THE PLAINTIFF THAT CERTAIN RECORDS COULD NOT BE PRODUCED BECAUSE THEY HAD BEEN DESTROYED.

Defendants submit that, contrary to the Court of Appeals' holding below, MCL 600.2912b(5) imposes no affirmative obligation on the part of Dr. McCadie or Hale St. Joseph Medical Clinic to explain to the plaintiff that certain records could not be produced because they had been destroyed.

As set forth above, MCL 600.2912b(5) requires that, upon receipt of a presuit notice of intent, a health professional or facility must allow the claimant access to all medical records related to the claim that are in the "control" of the health professional. "Control" is defined as "to exercise restraining or directing influence over" or "to have power over." *Webster's Ninth New Collegiate Dictionary* (1991).

There is no dispute that certain records requested by plaintiff, specifically Mr. Wade's laboratory test results between 1979 and 1992, were not provided to plaintiff's counsel because they had been destroyed in accordance with MCL 333.16213(1) and (4) (5/15/13 correspondence to plaintiff's counsel, Exhibit 10 to plaintiff's brief on appeal in the Court of Appeals). Although the Court of Appeals held below that §2912b(5) "obligated" defendants "to either turn over those records or offer a timely explanation for why they were no longer available," *Wade v McCadie*, *slip op* at 5, this is not, in fact, what the statute requires. Section 2912b(5) merely requires a health professional or

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facility to allow a claimant access to all medical records related to the claim that are within the "control" of the health professional.

First, medical records properly destroyed in accordance with the law are not within defendants' "control" and, therefore, defendants are excused from allowing access to such records under §2912b(5). A health professional or facility simply has no ability to exercise "restraint or direction," *Websters*, *supra*, over records that have been lawfully destroyed as permitted by statute. As such, the Court of Appeals erred in reading into §2912b(5) an obligation to turn over records that do not otherwise exist.

Not only is there nothing in §2912b(5) that obligates a health professional or facility to allow a claimant access to medical records that are not in the health professional's control, there also is nothing in the plain language of the statute that imposes an obligation by the defendants to provide the claimant with an explanation as to why certain records are unavailable. The Court of Appeals' failure to apply the plain language of §2912b(5), and instead create an obligation that is not included in the language of the statute, was improper. *Wickens*, *supra* (holding that the plain language of statute providing remedy only where plaintiff "has suffered" an injury bars claims for potential future injuries).

While the Medical Records Access Act does require a health care provider or health facility to inform the patient or his or her authorized representative if the medical records does not exist or cannot be found, MCL 333.26265(2)(c), there is no such similar requirement in §2912b. Section 2912b(5) does not require a health professional or health facility to allow access to a claimant's medical records in compliance with the Medical Records Access Act, nor does §2912d(3) afford a plaintiff an additional 91 days

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in which to file the affidavit of merit where a health professional or health facility fails to allow access to a claimant's medical records as required by the Medical Records Access Act. While the Legislature could have amended §2912b to require a health professional or facility to provide medical records in compliance with the Medical Records Access Act within 56 days of receipt of a presuit notice of intent, and also could have amended §2912d(3) to allow a plaintiff an additional 91 days to file the affidavit of merit if the health professional or facility fails to comply with the Medical Records Access Act within that 56-day period, this is not what the Legislature did.

The failure to comply with the Medical Records Access Act does not trigger any consequence or penalty related to the notice of intent. Rather, the only requirement for purposes of compliance with §2912b(5) is for a health professional or health facility upon receipt of a presuit notice of intent to allow the claimant access to all medical records related to the claim in the defendants' control. It is only a failure to comply with the statutory obligations under §2912b(5), and not a failure to comply with the requirements of the Medical Records Access Act, that affords plaintiff an additional 91 days in which to file an affidavit of merit.

III WHETHER BILLING RECORDS ARE MEDICAL RECORDS FOR PURPOSES OF MCL 600.2912b(5).

Defendants submit that there is no basis for the Court of Appeals' contention that MCL 600.2912b(5) requires "access" to billing records, or that the failure to provide "access" to billing records within 56 days of the mailing of the notice of intent entitles plaintiff to the additional 91-days in which to file the affidavit of merit pursuant to MCL 600.2912d. There is nothing in §2912b itself, or in any other statute either in effect at

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the time the Legislature enacted §2912b or currently in effect, that would equate billing records with "medical records" for purposes of §2912b(5).

As set forth above, MCL 600.2912b(5) requires that, upon receipt of a presuit notice of intent, a health professional or health facility must allow a claimant "access" to "all medical records" related to the claim that are in the control of the health professional or health facility, and further provides that the subsection does not restrict a patient's right of access to medical records "under any other provision of law," as follows:

> Within 56 days after giving notice under this section, the claimant shall allow the health professional or health facility receiving the notice access to all of the medical records related to the claim that are in the claimant's control, and shall furnish releases for any medical records related to the claim that are not in the claimant's control, but of which the claimant has knowledge. Subject to section 6013(9), within 56 days after receipt of notice under this section, the health professional or health facility shall allow the claimant access to all medical records related to the claim that are in the control of the health professional or health facility. This subsection does not restrict a health professional or health facility receiving notice under this section from communicating with other health professionals or health facilities and acquiring medical records as permitted in section 2912f. This subsection does not restrict a patient's right of access to his or her medical records under any other provision of law. [MCL 600.2912b(5) (emphasis added)].

There is no definition of "medical records" in the notice of intent statute, MCL 600.2912b. At the time the notice of intent statute was enacted by the Legislature in 1993[3], MCL 333.20175 and MCL 333.20201 addressed patient records[4]. The Legislature is presumed to be aware of existing law when drafting new laws. *Rogers v*

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[3] Although enacted in 1993, the statute did not go into effect until April 1, 1994.

[4] The Medical Records Access Act, which the Court of Appeals relied upon to establish the definition of "medical record," was not enacted until 2004, over ten years after the notice of intent statute was enacted in 1993.

Wcisel, __ Mich App __; __ NW2d __ (2015); citing *AFSCME v Detroit*, 267 Mich App 255, 269; 704 NW2d 712 (2005).

MCL 333.20175(1) established a duty on the part of a health facility or agency to "keep and maintain a record for each patient, including a full and complete record of tests and examinations performed, observations made, treatments provided, and in the case of a hospital, the purpose of hospitalization." MCL 333.20201(2)(b), in turn, entitled a patient or resident to inspect, or receive for a fee, a copy of his or her medical records upon request.

Nothing in the language of §20175 or §20201 incorporated "billing records" as part of the medical records. Rather, medical records were limited to a record of "tests and examinations performed, observations made, treatments provided, and in the case of a hospital, the purpose of hospitalization."

Later-enacted legislation has not expanded the definition of "medical records" to include billing records. The definition of "medical records" as provided by the Medical Records Access Act, MCL 333.26261 et seq, which was enacted in 2004 and regulates access to and disclosure of medical records in Michigan, does not include "billing records." The Medical Records Access Act defines "medical record" as "information oral or recorded in any form or medium that pertains to a patient's health care, medical history, diagnosis, prognosis, or medical condition and that is maintained by a health care provider or health facility in the process of caring for the patient's health." MCL 333.26263. This definition in no way incorporates billing records.

Other statutes enacted or amended either in conjunction with, or subsequent to, the Medical Records Access Act require compliance with the Act and incorporate the

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same definition of "medical record" as set forth in the Act. See MCL 333.20170 (requiring a health facility or agency to comply with the Medical Records Access Act); MCL 333.20175a (requiring a health facility or agency to protect, maintain, and provide access to records under §20175 and defining "medical record" consistent with the Act); MCL 333.16213 (requiring licensed individuals to keep and maintain and ensure accessibility and availability of medical records and defining "medical record" consistent with the Act); MCL 333.20201, as amended by 2006 PA 38 (entitling a patient or resident of a health facility or agency to inspect or receive for a fee a copy of his or her medical record upon request in accordance with the Act). None of these statutes expanded the definition of "medical records" to include billing records.

In fact, the federal Health Insurance Portability and Accountability Act (HIPAA), 42 USC §§ 1320d, et seq, specifically refers to medical records and billing records as separate records. HIPAA was enacted in 1996, and directed the Secretary of Health and Human Services (HHS) to create and implement regulations (the Code of Federal Regulations, or "CFRs") to facilitate the transmission of health information and to ensure the security and confidentiality of such information by "covered entities" (essentially healthcare providers and facilities). 42 USC §§ 1320d--1320d-8.[5] The regulations finally promulgated by the HHS Secretary to implement the privacy prong of this directive, the so-called "Privacy Rules," 45 CFR 164.500-164.534, set forth certain limitations on, and procedural requirements prerequisite to, the use and disclosure of "protected health information" (PHI) by "covered entities."

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[5] While the statute references only electronic information, the HHS Secretary promulgated regulations governing the disclosure, privacy, and protection of medical information in both electronic and non-electronic form.

One such provision in the Privacy Rules, 45 CFR 164.524, affords individuals a right of access to inspect and obtain a copy of their PHI in a "designated record set" held by a covered entity. A "designated record set" is defined in part as a group of records maintained by or for a covered entity that is the "medical records and billing records about individuals maintained by or for a covered health care provider." As such, there is a clear distinction made in HIPAA between medical records and billing records, which undermines the Court of Appeals' attempt to equate the two types of records.

The Court of Appeals seemingly relied upon the fact that billing information includes "diagnostic procedure codes, dates of testing, and charges for treatment" for its holding that billing records are part of the patient's medical records. *Wade v McCadie*, *slip op* at 5. Defendants submit, however, that simply because the billing records may contain some information that is also included in the medical records does not render billing records medical records. The Court of Appeals' conclusion, therefore, that defendants were obligated to provide billing records as part of plaintiff's medical records under §2912b(5) is without merit.

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RELIEF REQUESTED

WHEREFORE defendants-appellants WILLIAM McCADIE, D.O. and ST. JOSEPH HEALTH SYSTEM d/b/a HALE ST. JOSEPH MEDICAL CLINIC respectfully request that this Honorable Court reverse the Court of Appeals' judgment and affirm the trial court's grant of summary disposition in this matter. Alternatively, defendants request that this Court grant leave to appeal.

Respectfully submitted,

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STATE OF MICHIGAN

IN THE SUPREME COURT

JAMES WADE

Plaintiff-Appellee,

v

WILLIAM McCADIE, D.O. and ST. JOSEPH HEALTH SYSTEM d/b/a HALE ST. JOSEPH MEDICAL CLINIC

Defendants-Appellants.

Supreme Court
Docket No.: 151196

Court of Appeals
Docket No.: 317531

Iosco County Circuit Court
Case No.: 13-007515-NI

CERTIFICATE OF SERVICE

DORIS G. JONES hereby certifies that she is employed with the firm of KITCH DRUTCHAS WAGNER VALITUTTI & SHERBROOK, and that on November 12, 2015, she electronically filed: **SUPPLEMENTAL BRIEF BY DEFENDANTS-APPELLANTS WILLIAM MCCADIE, M.D. AND ST. JOSEPH HEALTH SYSTEM D/B/A HALE ST. JOSEPH MEDICAL CLINIC** and **CERTIFICATE OF SERVICE** with the Clerk of the Court using the ECF system, which will send notification of such filing to the following:

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